VELUSAMY & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Suffian F.J.) February 11, 1972]
[Raub — Criminal Appeal No. 6 of 1971]

Road Traffic — Driving motor vehicle without proper insurance cover — Motor vehicle insured for private use — Used as public service vehicle — Whether insurance covers user — Road Traffic Ordinance, 1958, ss. 74, 75, 79 and 144.

This was an appeal against the conviction of the first appellant on the charges of (a) using a motor vehicle as a public service vehicle without a licence authorising such use contrary to section 92(1) of the Road Traffic Ordinance, 1958; (b) using the motor vehicle without proper insurance cover, contrary to section 74(2) of the Ordinance; and (c) using the car which was registered as a private car for another purpose, namely as a public service vehicle, contrary to section 22(2) of the Ordinance. The second appellant who was the managing director of the company also appealed against his conviction as the registered owner of the car of more or less similar charges. It was argued *inter alia* on the appeal that by virtue of section 79 of the Road Traffic Ordinance the use of the motor vehicle as a public service vehicle was covered by the insurance policy.

Held: (1) in view of the statutory presumption under section 144(a) of the Road Traffic Ordinance, 1958, which had not been rebutted by the first appellant, he was rightly convicted on the first charge;

(2) section 79 merely provides that the restriction in the policy shall have no effect as regards the civil liability of the first appellant and did not affect the first appellant's criminal liability and therefore the first appellant was rightly convicted on the second charge;

(3) on the evidence the first appellant was rightly convicted on the third charge;

(4) as the second appellant had shown that he never permitted the motor vehicle to be used for hire purposes and had no knowledge that anyone had so used it, the learned magistrate was in error in convicting him and his conviction must be quashed;

(5) as the managing director of the company was not aware of the illegal use to which the motor vehicle was put by the first appellant, the order confiscating the motor vehicle must be set aside and the car returned to the company.

Case referred to:-

(1) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.

CRIMINAL APPEAL.

C. Thambiah for the appellants.

Gunn Chit Tuan (Deputy Public Prosecutor) for the respondents.

Suffian F.J.: The first appellant is a clerk working for the K. R. Taxi Service Sdn. Bhd. in Kuala Lipis. The company owns several taxis. It also owns a private car BD5318, the car in question, and employs six drivers. It has its office near the taxi stand in Kuala Lipis. The first appellant occasionally drives the company's cars.

The second appellant is the managing director of the company.

On 4th March, 1971, the first appellant was driving the car in question along Main Street, Kuala Lipis, when he was stopped by Inspector E. J. A. de Silva who found in the car three Malay passengers. He stopped the car, suspecting it was being used as a pirate taxi. As it happened, this car had previously been kept under observation by two policemen, one of whom had died. The surviving policeman, constable Mazlan (PW5), said in evidence that he had kept it under observation from 3rd December until 16th December during which time he saw it 24 times in all, carrying a variety of passengers.

In the event the first appellant was convicted by the learned magistrate, first, of using the car as a public service vehicle without a licence authorising such use, contrary to section 92(1) of the Road Traffic Ordinance, 1958; secondly, of using the car without proper insurance cover, contrary to section 74(2); and, thirdly, of using the car which was registered as private car, for another purpose (namely, as a public service vehicle), contrary to section 22(2) of the same Ordinance. The second appellant was convicted, as the registered owner of the car, of more or less similar charges.

They appeal to this court.

As to the first charge, in view of the definition of "public service vehicle" in section 2, it is necessary for the prosecution to prove that the first appellant was using the car for carrying passengers *for hire or reward or for any other consideration.* In so far as it was necessary to establish this offence it shall be presumed until the contrary is proved that the conveyance of the three Malays in the car was for hire or reward: this is expressly provided by section 144(a).

In view of the statutory presumption, it was quite proper for the learned magistrate to call on the two appellants for their defence.

It was then up to the appellants to prove that the conveyance of the three Malays was not for hire or reward. They did not have to prove this beyond reasonable doubt. They only had to satisfy the court that it is more probable than not that the Malays were not being conveyed for hire or reward, *Public Prosecutor* v. *Yuvaraj*.[1]

The learned magistrate considered the evidence for the prosecution and considered the evidence for the defence and, applying the right test, came to the conclusion that the first appellant was guilty of the first charge. I do not think that it would be proper for this court to interfere with this finding of fact, and I therefore uphold the conviction of the first appellant on this charge.

As regards the second appellant he said in his defence that the company of which he was managing director was the registered owner of the car and that he had never permitted the car to be used for hire purposes and he had no knowledge that any one had so used it. He was not challenged on this in cross-examination, but he admitted that the car was his responsibility. Now subsection (4) of section 138 provides that where the registered owner is a company a director shall be deemed to be guilty, unless he proves that the offence was committed without his consent or connivance and that he exercised such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions as a managing director and to all the circumstances. Here again the second appellant had only to satisfy the court on a balance of probabilities in order to bring himself outside the scope of subsection (4) of section 138. In view of the nature of the evidence for the prosecution and that for the defence, I think that the learned magistrate was in error

in finding the second appellant guilty of the first charge, and I would therefore quash his conviction on that charge. It follows that his conviction on the other two charges should also be quashed, and I accordingly quash them and order that the sentences on them be set aside and any fines paid by him be refunded.

Now to return to the first appellant, the second charge against him alleged that when he used the car as a pirate taxi there was no insurance cover in relation to such user. The uncontroverted evidence was to the effect that the car was registered with the Road Transport Department for private use only and that the insurance certificate produced by the first appellant did not cover use for hire or reward.

But the legal argument made on his behalf in the lower court, which argument is repeated before me, is that by virtue of paragraph (k) of section 79 the use of the car as a pirate taxi *was* covered by the policy.

To understand this argument, it is necessary to look at certain provisions of the Ordinance.

Sub-section (1) of section 74 provides —

"Subject to the provisions of this Part of this Ordinance it shall not be lawful for any person to use... a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person... such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Ordinance."

Sub-section (2) prescribes the penalty for contravening the above provision.

Sub-section (1) of section 75 provides —

"In order to comply with the requirements of this Part of this Ordinance a policy of insurance must be a policy which —

(a) [not relevant];

(b) insures such person, persons... as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle... on a road....."

Then sub-section (4) of the same section provides that a policy shall be of no effect for the purposes of this Part of the Ordinance unless and until there is delivered by the insurer to the insured a certificate of insurance in the prescribed form. This certificate must contain such particulars of any conditions subject to which the policy is issued.

Finally section 79 (in so far as material) provides —

"Where a certificate of insurance has been delivered under sub-section (4) of section 75 of this Ordinance to [the assured], so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to....

(k) the motor vehicle being used for a purpose other than the purpose stated in the policy;

shall, as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance, be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person."

This paragraph (k) is new, being added to the section by Act No. 21 of 1967.

I think that the learned magistrate was right in holding that that paragraph made no difference to the first appellant's criminal liability under sub-section (1) of section 74. That sub-section says that he could not use this car on the day in question unless there was in force in relation to the use of that car by him such a policy of insurance in respect of third party risks as complied with the requirements of Part IV of the Ordinance. The certificate of insurance clearly stated that the policy did not cover use for hire or reward. All section 79 says is that this restriction in the policy shall have no effect only as regards the first appellant's *civil liability towards third parties*. In other words, notwithstanding this restriction the insurer remains ultimately liable to compensate third parties injured by the assured, because (as made clear by the proviso) if the insurance company pays any sum to third parties by virtue of this section, then it may recover that sum from the assured. Section 79 is concerned only with civil liability: it does *not* affect the first appellant's *criminal* liability.

I am therefore of the opinion that the first appellant was rightly convicted on the second charge.

I am of the opinion that he was also rightly convicted on the third charge.

The sentences on all the three charges are not excessive.

I would therefore dismiss his appeal against conviction and sentence.

Finally I turn to the order confiscating the car in question. In view of my conclusion that the managing director of the company was not aware of the illegal use to which the car was put by the first appellant, I order that the car be returned to the company.

Order accordingly.

Solicitors: *Chellappah Thambiah & Co.*

TEE GEOK TONG & ANOR. v. TAN KIM HONG & ORS.

[O.C.J. (Mohamad Azmi J.) June 15, 1973]
[Kuala Lumpur — Civil Suit No. 473 of 1969]

Tort — Negligence — Duty of care — Contributory negligence.

In this case the facts were that a motor-lorry driven by the first defendant got stuck in the ground. The first defendant inserted a metal plate under the rear-side rear wheel of the motor-lorry and then started the lorry. The rear wheels began to spin and the metal plate flew backwards and hit the deceased, a bystander, who was then nearby standing behind the lorry. The second defendant saw the deceased coming near the lorry when it got stuck but neither he nor the attendant warned the deceased of the danger of standing behind the lorry.

Held: (1) it was the duty of the defendants to exercise reasonable care to ensure that there were no persons within the area of potential danger before starting the engine of the motor-lorry and therefore the defendants were liable in negligence;

(2) there was contributory negligence on the part of the deceased and liability would be apportioned on the 50:50 basis.